No. 106.

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for Appellee - on reargt.

Filed Mar. 2, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE NEW YORK INDIANS, APPELLANTS,
v.
THE UNITED STATES. } No. 106.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENT TO APPELLEE'S BRIEF ON REARGUMENT.

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Since the appellee's brief on reargument was written the appellants have filed a second additional brief on reargument, which requires notice as to a few points.

THE INTRODUCTION OF NEW MATTER NOT IN THE RECORD.

In the appellee's brief on reargument objection is made to the introduction of any new matter not in the record and not the subject of judicial notice. This objection is now renewed as regards Senate confidential Document B, Twenty-sixth Congress, first session, certain citations from the Senate Executive Journal, vol. 5, and

House Report No. 1858, Fifty-second Congress, first session, all of which it is now attempted to bring into the case, the first two as evidence that the Senate proviso of June 11, 1838, was not communicated to the Indians and the last as evidence that Congress believed that the United States had violated the treaty of Buffalo Creek.

It is submitted that the time for the *trial* of this case has passed, and that all that remains is for this court to decide the law of the case upon the facts as found by the court below. No *new evidence* can now be introduced.

It is conceded that the official publication of confidential Document B is the subject of judicial notice, so that had the appellants seen fit to put its contents in evidence in the court below, their genuineness would not have had to be proved; but that fact does not give the various papers contained in this document any higher evidentiary value than would belong to the same papers in unofficial form but duly proven, nor does it make them the subject of judicial notice any more in the one case than in the other. Even if this were otherwise, the whole document, and not merely a few extracts, would have to be laid before the court, by original or certified copy, when the court would be able to learn much as to the intense and permanent opposition of the Indians to removal, and would see clearly that the Onondagas at Onondaga, Oneidas at Green Bay, Stockbridges, Munsees, and Brothertowns were not parties to the treaty of Buffalo Creek, as ratified and proclaimed. More than this, the court would find evidence that the substance of the Senate proviso of June 11, 1838 (as to what should be done

with the surplus land and money in case of a partial emigration of the Indians), was made known to the Indians, as also that the same proviso was before the Senate in 1840, just before the final resolution of ratification, so that when the latter resolution (which was intended merely to supplement and not to repeal the resolution containing the proviso) was passed, the proviso must still have been regarded as valid and binding.

The reports of committees contained in the extracts from Senate Executive Journal, vol. 5, and in House Report No. 1858, Fifty-second Congress, first session, are objected to on the same ground, viz, that if they have any evidentiary value they should have been produced at the trial, for incorporation into the findings. Moreover, that portion of the latter report which the appellants wish to use (Second Addl. Brief, pp. 38–39) is merely the argument of a committee in support of a bill which did not pass. How such an argument can be received as evidence of the intention of Congress does not appear.

An illustration of the failure of counsel to distinguish between what is in the record and what is not, is found in the reference to Senate Miscellaneous Document No. 46, Fifty-second Congress, first session (containing the findings in the Congressional case), which is stated to be "set forth in the record" in this case. (2d Addl. Brief, p. 37.) It is in the appellant's additional brief, and the objection to it is that it is *not* in the record.

The second additional brief also states (p. 40) that the findings in the Congressional case are "in every material fact" the same as the findings upon which judgment

was entered in the court below. This statement is emphatically denied. The facts most vital to the defense did not appear in those earlier findings.

The proviso to the Senate resolution of 1838.

That this proviso was not physically part of the written treaty to which the assenting tribes gave their assent has never been denied, but that fact does not prove that the proviso was not made known to those tribes. It has already been shown that, as regards the rights of the Indians, this proviso was merely declaratory of the provisions of the treaty, properly understood. (Appellee's Brief on Rearg., p. 26.) There is, however, every indication, short of a positive statement, that it was fully made known to the Indians. (Appellee's Suppl. Brief, p. 16.)

The object and purpose of the parties.

Appellants' counsel state that "the object and purpose of the Indians" in making the treaty was "to secure a 'permanent and peaceful home' west of the Mississippi." (2d Addl. Brief, p. 27.) Counsel are so convinced of the abiding determination of the Indians to emigrate that they omit from their quotation (at the foot of the page) from the preamble to the treaty certain important words which show that the treaty was merely tentative and that the opposition to emigration was well known. The words "by *bringing them to see and feel*, by his justice and liberality, that it is for their interest to do so [i. e., remove] without delay," are among the most important

words in the whole treaty in making plain its object and the circumstances under which it was made. Their omission, however inadvertent, from what purports to be a quotation from the preamble, is a serious defect in the argument based on such quotation.

Whether the treaty itself made a grant of the lands.

It is hardly an important question whether or not a grant was made by the treaty itself, or was to be made in the future, when the patents issued, because if there was a grant it was only in favor of the Indians who desired to remove, and the record shows that all these Indians did so, while the estate granted was on the condition precedent of removal to the land within a certain specified time. Appellants' counsel cite the words of grant contained in several other Indian treaties, to show, apparently, that such language is the equivalent of that used in the Buffalo Creek treaty. (2d Addl. Brief, p. 31.) It is enough to point to the fact that not one of these treaties use the words "set apart," but all of them use such words as "convey," "give," "grant," or "cede."

The appellants contend (2d Addl. Brief, p. 16) that the sale of the Seneca reservations to Ogden and Fellows in 1838 proves "that the Indians understood and believed that on the ratification of the treaty they secured *a vested right and estate* in the Kansas lands," the idea evidently being that the Indians would never have sold those lands unless at the same moment that the sale became binding they should have become possessed of a present vested estate in other lands. This

contention assumes greater legal knowledge and a more abundant care and caution on the part of the Indians than can properly be ascribed to them, or than the occasion demanded. They knew nothing of vested estates, but what they knew was that they secured a right to be removed to other lands, and that their vendees secured a right to call upon the Government to remove them to such other lands. They knew, too, that their vendees would exercise this latter right, so that their own removal to the West was certain, whether they wish to avail themselves of their right to be removed or not. This knowledge sufficed them, and it sufficed to make them earnestly resist all suggestions of removal until 1842, when the arrangements were changed, and they reacquired the right to stay in New York.

The next contention (2d Addl. Brief, p. 17) is that the proviso in section 3 of the act May 28, 1830 (4 Stats., 412), in conformity with which the patent was to issue, "implies that a title had vested in the Indians." Undoubtedly when an exchange of lands was effected under that act the title vested, but the only effect of the proviso was to declare that in spite of the guaranty and the patent provided for by the act, the Indians should have no absolute estate in the land, but only a right of occupancy, which would terminate on their abandonment or becoming extinct. Moreover, the present case does not involve any exchange under the act of 1830, and the only connection of that act with the case is that it was provided that when the patent or patents issued (which could not be until the emigration had taken place, and the extent

of the territory occupied, and to be covered by the patents, was known) they should conform to the third section.

In regard to the authorities cited as to the effect of legislative grants, it should be noted that *Schulenberg* v. *Harriman* (21 Wall., 44) involved a statute with specific words of grant, while *United States* v. *Brooks* (10 How., 442) and *Doe* v. *Wilson* (23 How., 457) were cases where lands were excepted from the operation of treaties. In *United States* v. *Brooks* the Caddoes had granted certain land to François Grappe and his sons by "deed of gift" in 1801, before the cession of Louisiana, and the treaty of 1835, ceding the Caddo lands to the United States, recited this grant and provided that the Grappes should have their right to the land reserved to them in fee. (7 Stats., 472–473.) This was an unconditional confirmation of the Caddo deed of gift, and as complete an assurance as an original grant from the United States would have been. That case bears no resemblance to the mere setting apart of lands, grants of which could subsequently be made in case the contemplated grantees chose to remove to the lands so set apart.

In *Doe* v. *Wilson* the Pottawatomies had ceded certain lands to the United States, and by the same treaty the United States agreed "to grant" certain specified quantities of the ceded lands to certain Indians of the tribe individually. The court held that in such a case the Indian title by occupancy was simply reserved from the operation of the treaty so that "the reserves took by the treaty, directly from the [Pottawatomie] nation, the

Indian title * * * to which the United States title was either added or promised to be added." The Indian title was alienable, the treaty not prohibiting its sale, and hence when the lands were surveyed and selections were made for these individual grants, an alienee would have all the rights that his alienor would have had had he retained his title. Such a case bears as little resemblance to the present as does that of *United States* v. *Brooks*.

Appellants' counsel point out that the original fifth article, struck out by the Senate (Rec., 13), uses the words "the foregoing grant," and they cite *Ex parte Crow Dog* (109 U. S., 556) as authority for construing the treaty in the light of those words. That case, however, referred to parts of a statute which had been law, but had subsequently been repealed, whereas the words quoted were struck out before the treaty was adopted, and hence never made part of the law of the land at all. They do not, therefore, express any intention or opinion of the treaty-making branch of the Government, and all that their presence in the record shows is that the Senate never sanctioned the use of such words.

The effect of the Tonawanda treaty.

Appellants' counsel contend (2d Addl. Brief, p. 42) that the Tonawanda treaty of 1857 constitutes such a construction of the treaty of 1838, as to all the parties thereto, as to bring the case within the rule of *Foster and Elam* v. *Neilson* (2 Pet., 253, 307). The argument is that the Tonawanda treaty recognized a then existing *right* of

the Tonawandas to the Kansas lands, and to be removed thither, and that all the other parties to the treaty of 1838 had the same rights. Turning to the Tonawanda treaty, however (11 Stats., 735), it is found to contain a recital that the Tonawandas *had* had such rights, but it is silent as to whether their rights still existed or not, while the words, "the United States are willing to exercise the liberal policy which has heretofore been exercised in regard to the Senecas, and for the purpose of relieving the Tonawandas of the difficulties and troubles under which they labor," indicate that the treaty was recognized as a matter of grace on the part of the United States rather than of right. That the Tonawandas, in spite of their opposition to the wishes of the Government, had, from the peculiar circumstances of their case, certain legal rights which the other Indians had not, has already been shown. (Appellee's Brief, p. 78.) These peculiar rights were enough to warrant the treaty, if its language be held to recognize a right, without involving the conclusion that the other Indians were entitled to be provided for in the same way that the Tonawandas were.

It is submitted, however, that the case of *Foster and Elam* v. *Neilson* only applies where the course of the political branch of the Government has been "a plain one," to use the words of Marshall, C. J.; i. e., a consistent and undeviating course. Even if the Government believed in 1857 that the Tonawandas had rights under the treaty of 1838, its subsequent refusal for nearly thirty years to accede to the demands of the other New York Indians, in spite of constant agitation of

their claims, and its ultimate reference of the matter to the Court of Claims, first, for a decision on the facts, and again for a judicial determination upon the facts reported or other evidence, show conclusively that it has never looked upon the rest of the New York Indians as it did upon the Tuscaroras. To hold that because a treaty has once been made with certain Indians, recognizing their rights under a previous treaty, a judicial determination of the rights of other parties to the same previous treaty is impossible, in spite of the express desire of Congress to have such a determination, is an elevation of treaty-making power above the legislative and judicial, for which no warrant is found in the Constitution.

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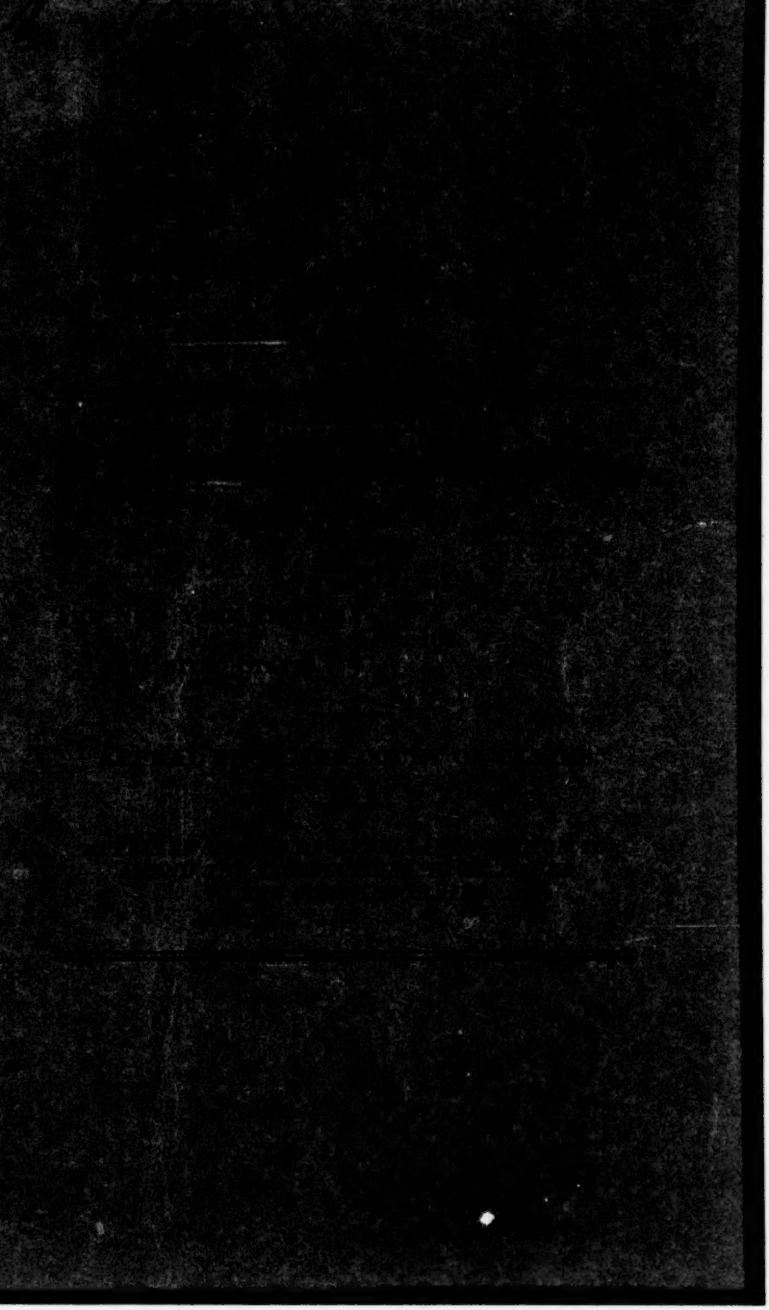

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE NEW YORK INDIANS
v.
THE UNITED STATES. } No. 106.

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S BRIEF ON APPELLANTS' MOTION TO AMEND THE INSTRUCTIONS TO BE ISSUED TO THE COURT OF CLAIMS.

The appellants' motion, though couched in the form of a motion to amend the instructions contained in the judgment of the court, goes far beyond this in reality, as the court intimated when the motion was made. It seeks a reconsideration by the court of certain points in the case, and even a consideration of certain jurisdictional questions which were not, strictly speaking, before the court at all at the arguments, because, as the record stood, they could not be made the subject of assignments of error, the court below having decided them in the appellants' favor, while as the judgment was in favor of the appellee

upon the whole case no cross appeal could be taken. Now that the judgment has been reversed, these questions necessarily affect the new judgment to be entered in the court below, and they must arise in this court if it decides to give precise instructions to the court below as to the new judgment to be entered rather than to direct in general terms that a judgment be entered upon the facts appearing in the court below as controlled by the law laid down by this court. The motion, therefore, whatever its form, is in substance a motion for what is properly the subject of a reargument, and even in part a new argument upon new questions.

The appellants' motion covers two points: First, the liability of the United States for the land not sold, but "otherwise disposed of," as distinguished from the land actually sold; and second, the parties to whom the United States is liable, and the extent of this liability to each of such parties.

As to the first point, it may be conceded that, under the law as laid down by this court, there is no reason for restricting the liability of the United States, as appellants' counsel claim the judgment of this court does restrict it, to "the net amount actually received by the Government for the Kansas lands," it being a fact of record in the court below (though not in this court) that such amount is much less than the deduction which the judgment requires on account of the settlement with the Tonawandas. The doctrine of this court's opinion requires that the United States be held liable for the lands "otherwise disposed of" as well as for those actually sold. As to the amount so allowed for the former, how-

ever, it can not be assumed without evidence that the lands given away would, if sold, have realized as much as the lands actually sold, or that the judgment should be, as the appellants propose, for the value of the whole tract, based on the net price obtained for such portion of it as was sold. It is much more likely that if part of this land had not been given away, as it was, for internal improvements, the whole tract could not have been sold, or not on as favorable terms as were obtained for the small portion actually sold. The judgment to be entered by the court below, therefore, should be for the net amount received for the land sold, and the net amount which the court below may find could have been obtained for the land otherwise disposed of, if it had all been sold as public land, less the amount paid the Tonawandas for their interest in the land, and other just deductions.

In the second point of the motion the appellants seek to commit this court to the position that all the parties claimant in this suit were parties to the treaty of Buffalo Creek and entitled to a judgment—a position not merely unwarranted by anything stated in the opinion of this court in this case, but even to some extent at variance with that opinion, the court holding that, under the amended treaty, the Kansas lands were intended for the tribes then in the State of New York, whereas four of the parties claimant are tribes who had left New York some years before and were then in Wisconsin.

This court is now asked to instruct the Court of Claims "to enter judgment for the claimants for an amount to be represented by the 1,824,000 acres of land mentioned in the treaty," at a certain rate, less certain specific deduc-

tions, which amount to 218,240 acres. The instruction therefore necessitates a judgment for an amount to be represented by precisely 1,605,760 acres, at the rate realized from such of the lands as were sold, this judgment to be entered in favor of "the claimants," i. e., *all* the claimants, to be divided among them presumably on the basis of schedule in the treaty, though this is not stated.

The judgment entered on April 11, 1898, covered an instruction to enter a judgment for "the net amount actually received by the Government for the Kansas lands" less a certain deduction of 208,000 acres "*and other just deductions.*" Conceding that the appellants should not be restricted to "the net amount actually received" (for then, after making the required deduction, they would get nothing), it is still submitted that the Court of Claims should not give judgment for an amount represented by all the lands, less only the acreage covered by the settlement with the Tonawandas (208,000 acres) and that actually allotted to certain Indians (10,240 acres), but that "other just deductions" should also be made.

The question then arises, What "other just deductions" should be made? It is submitted that the share of those tribes or bands who, although claimants in this case, were *not parties to the treaty* as ratified and proclaimed, constitutes a deduction which is not merely just, but is necessitated by the fact that the claims of those tribes or bands are not within the jurisdiction of the court below or of this court on appeal.

The jurisdictional act in this case (act of January 28, 1893, 27 Stats., 426) authorizes the Court of Claims and

this court to hear and adjudicate "the claim of the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the 15th of January, 1838, against the United States, growing out of the unexecuted stipulations of said treaty on the part of the United States."

It is clear beyond question that under this act neither the Court of Claims nor this court can have any jurisdiction over any claims of New York Indians, except such as were *parties* to the treaty of Buffalo Creek. The petition in this case states that the parties claimant are:

> * * * the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, of the 15th day of January, A. D. 1838, viz, the New York Indians in the States of New York and Wisconsin, including the Seneca Nation and the Oneida, Onondaga, Tuscarora, Cayuga, St. Regis, Brothertown, Stockbridge, and Munsee tribes of Indians.

It is submitted on the part of the United States that, as a matter of fact, this enumeration of the Indians who were parties to the treaty of Buffalo Creek is incorrect, the only parties to that treaty being the following tribes of New York Indians, viz, the Senecas, Cayugas, Onondagas residing with the Senecas, Oneidas in New York, Tuscaroras, and St. Regis, and further that those tribes are entitled, under the treaty as construed by this court, to a judgment based upon their respective shares of the Kansas lands at the rate of 320 acres apiece, for each individual of these tribes, as their numbers were computed in the treaty.

The interest of each tribe in the land set apart.

The preamble to the treaty of Buffalo Creek states that it is "entered into between the United States of America and the several tribes of the New York Indians, the names of whose chiefs, headmen, and warriors hereto subscribed, and those who may hereafter give their assent to this treaty in writing, within such time as the President shall appoint."

The second article of the treaty declared that the United States agreed to set apart a certain tract of country situated directly west of the State of Missouri "as a permanent home for all the New York Indians now residing in the State of New York or in Wisconsin or elsewhere in the United States, who have no permanent homes," and the country to be set apart was described by certain boundaries and stated "to include 1,824,000 acres of land, being 320 acres for each soul of said Indians as their numbers are at present computed," the same article further stating that "it is understood and agreed that the above-described country is intended as a future home for the following tribes, to wit, the Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and the Brothertowns residing in the State of New York and at Green Bay; and the same is to be divided equally among them according to their respective numbers as mentioned in the schedule hereunto annexed." The schedule annexed gave a census of the various tribes, the total population being 5,485, but this total is not stated in the schedule itself.

Article 7 of the treaty stated that the rejection by the President and Senate of any provisions applicable to one tribe or distinct branch of a tribe should not be construed to invalidate the treaty as to others, but that as to them it should be binding and remain in full force and effect.

The statement that the acreage to be set apart was 320 acres for each soul of said Indians as their numbers were then computed makes it clear that 320 acres for each individual was regarded as the proper quantity to be set apart for, and ultimately enjoyed by, the Indians, so that if their numbers had been greater a larger area would have been set apart, while if their numbers had been less the acreage set apart would have been smaller. There is, however, a patent inconsistency between the acreage which it is stated was to be set apart and the schedule of the census of the Indians. The acreage set apart gives precisely 320 acres apiece for 5,700 Indians, while the census shows that there were but 5,485 New York Indians, which would make the proper acreage, on the basis of 320 acres for each person, 1,755,200 acres—a difference of 68,800 acres.

Probably the area stated in article 2 was originally so stated under the impression that the actual number of New York Indians was 5,700, the party drawing up this article not having the schedule before him at the time; and, owing to the fact that the schedule gave the population of each tribe, but did not show the total population, the error in the first article remained undiscovered. The language of the article, however, stating that the acreage is "320 acres for each soul of said Indians, as their numbers are at present computed," makes the intention of

the parties so clear that the statement of the acreage as 1,824,000 acres should be corrected by the schedule, and the treaty should be understood as providing for the setting apart of 1,755,200 acres, and no more.

The provisions of the treaty further show that each of the respective tribes was to have a particular tract of land set apart for it, and these separate tribal tracts were of course to be of a size proportionate to the population of each tribe at the rate of 320 acres for each individual. This must be borne in mind in connection with the concluding words of the second article, stating that the country to be set apart was intended as a future home for the tribes named, the same "to be equally divided among them according to their respective numbers, as mentioned in the schedule hereunto annexed." Taken alone these words would indicate that the whole 1,824,000 acres (or 1,755,200 acres, if the census is to be regarded) were to be divided among the Indians in New York, without making any deduction for the exclusion of those in Wisconsin, but the familiar rule that all parts of a statute or treaty (for the rule must apply as much to a treaty as to any other part of the law of the land) must be construed together so as to harmonize forbids such a conclusion. This very article declared that the size of the tract depended on the population of the Indians as then computed, and hence the words "to be equally divided among them according to their respective numbers" must mean that if all the tribes mentioned became parties to the treaty, the country to be set apart was to be equally divided among them according to their respective numbers, but that if for any reason any of the tribes

either did not become parties to the treaty or subsequently withdrew from participation therein, the remaining tribes should have precisely what they would have been entitled to had all the tribes participated in the treaty and its benefits, and the withdrawal or nonparticipation of any tribe or tribes should not increase the acreage to be granted to the remaining tribes. The failure of any tribe to become a party to the treaty could not possibly affect the obligations of the United States to the other tribes nor the consideration which was to pass from those tribes to the United States, and there could be no possible reason for increasing the obligations of the United States toward any tribe or tribes merely because certain other independent tribe or tribes should have failed to become parties to the treaty.

Whatever alliance may have existed between these tribes or any of them, the treaty recognizes no such alliance, but deals with each tribe as a separate, independent body, and the terms of the seventh article, providing that a rejection of the provisions applicable to one tribe or branch of a tribe should not be construed to invalidate the treaty as to others, but as to them it should be binding and remain in full force and effect, show the intention that the treaty was to have precisely the same force as to those tribes as to which it remained in full force and effect as it would have had if its provisions had been applicable to all the tribes, and that no exclusion of any tribe from the operation of the treaty could either increase or diminish the value of the rights of the remaining tribes under the treaty.

Who the "parties to the treaty" were.

The treaty itself bears the signatures of the chiefs, headmen, and people of the Senecas, Cayugas, Oneidas in New York, Oneidas at Green Bay, St. Regis, Onondagas residing with the Senecas, and Cayugas, but no signatures in behalf of the Onondagas at Onondaga (a body shown by the schedule to be distinct from the Onondagas residing with the Senecas), nor of the Stockbridges, Munsees, and Brothertowns, and hence the four tribes last mentioned were not parties to the treaty, according to the terms of the preamble, which states that the treaty was entered into "between the United States of America and the several tribes of the New York Indians, the names of whose chiefs, headmen, and warriors are hereto subscribed." It is manifest that when the original treaty was executed only the tribes whose chiefs, headmen, and warriors signed the treaty were parties thereto, and that the Onondagas at Onondaga, Stockbridges, Munsees, and Brothertowns were not parties and could have no rights under the treaty unless they subsequently became parties.

The nonparticipation of the Onondagas at Onondaga is explained by the fact, stated in the record (p. 18), that they had officially declared that they would not remove; while the nonparticipation of the Stockbridges, Munsees, and Brothertowns was manifestly due to two facts: First, that they had no interest in the 500,000-acre tract at Green Bay, a portion of which was relinquished to the United States in the first article of the treaty, and, second, that other arrangements were about to be made with them.

The Menomonee treaty of October 27, 1832 (7 Stats., 405), expressly states more than once that the 500,000-acre tract was to be granted to "the Six Nations [i. e., Senecas, Cayugas, Onondagas, Oneidas, Tuscaroras, and at one time the Mohawks. See Rec., p. 7.] and the St. Regis tribe of Indians," a description which does not include the Stockbridges, Munsees, and Brothertowns, who were provided for by the United States in a proviso to the Menomonee treaty of February 8, 1831 (7 Stats., 342, 347), as recited in the preamble of the treaty of October 27, 1832, the Stockbridges and Munsees receiving two townships, of 23,080 acres each, on the east side of Lake Winnebago, and the Brothertowns one similar township adjoining the others, all three tribes being compensated for their improvements on the land which they had formerly occupied in Wisconsin, and which they were required to abandon.

The preamble of the treaty of Buffalo Creek, in reciting the Menomonee treaties of 1831 and 1832, refers to the Green Bay lands as the "500,000 acres of land so secured to the New York Indians of the Six Nations and the St. Regis tribe," thus showing the construction put by both parties to this treaty upon those prior treaties.

While the treaty of Buffalo Creek (which, as already stated, had been signed by all the tribes of the New York Indians except the Onondagas at Onondaga, Stockbridges, Munsees, and Brothertowns) was before the Senate, a treaty with one of the signatory tribes or lands, viz, the Oneidas at Green Bay, was executed, ratified, and proclaimed before the Senate's first resolution of ratification of the Buffalo Creek treaty was adopted.

The Oneida treaty (7 Stats., 566) contains, on the part of the Oneidas at Green Bay, a cession of their share of the unoccupied part of the 500,000-acre tract, the same which these Indians, together with the other parties of the treaty of Buffalo Creek, had already agreed to cede to the United States; but the consideration for this cession was changed from what it had been in the treaty of Buffalo Creek, and instead of receiving an interest in the lands to be set apart west of the Mississippi, the Oneidas at Green Bay were to receive "in consideration of the cession contained in the first article of this treaty" $33,500. This being the case, any further participation of the Oneidas at Green Bay in the treaty of Buffalo Creek was superfluous. These Indians had sold their rights in the unoccupied Wisconsin lands for cash, and they had no further interest therein which they could convey, or which could operate as a consideration for any promises by the United States.

Accordingly, the Senate struck out the nineteenth article, containing the special provisions for the Oneidas at Green Bay, and also the words "and at Green Bay" in the latter part of the second article, thus restricting the beneficiaries of the treaty, the tribes for whom the Kansas lands were intended as a future home, to the Indians residing in New York, as this court has recognized in the first paragraph of page 16 of the opinion. The excision of the words "and at Green Bay" also operated to exclude from participation in the benefits of the treaty the Stockbridges, Munsees, and Brothertowns, who lived in Wisconsin, as already stated, but as none of these tribes had signed the treaty, this action of the

Senate took from them no rights which they had previously possessed.

The Senate resolution of June 11, 1838, provided expressly:

> That the treaty shall have no force or effect whatever as it relates to any of said tribes, nations, or bands of New York Indians, nor shall it be understood that the Senate have assented to any of the contracts connected with it, until the same, with the amendments herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each one of said tribes or bands, separately assembled in council, and they have given their free and voluntary assent thereto; and if one or more of said bands or tribes, when consulted as aforesaid, shall freely assent to said treaty, as amended, and to their contract connected therewith, it shall be binding and obligatory upon those so assenting, although one or others of said bands or tribes may not give their assent, *and thereby cease to be parties thereto.*

After the assents of certain tribes had been obtained, the treaty was again referred to the Senate by the President on January 22, 1839, and was returned to the President March 2, 1839, with the resolution that whenever he should be satisfied that the assent of the Senecas had been given, in accordance with the above resolution, he should make proclamation of the treaty. On January 14, 1840, the President again returned the treaty to the Senate, with certain documents, all of which are printed, together with the message, in a document entitled, "Confidential B, Twenty-sixth Congress, first session. Message from the President of the United

States, transmitting the amended treaty with the New York Indians, and certain documents relating thereto." This confidential document (a copy of which is in the possession of the Secretary of the Senate) was referred to by the appellants' counsel in their Second Additional Brief on Reargument, beginning on page 5. It was objected to by the counsel for the United States as outside the record, and not the subject of judicial notice, but it appearing that the court has overruled this objection and treated the document as properly the subject of judicial notice (Opinion, p. 19), counsel for the United States now refer to it in order to show what information was before the Senate when it adopted the final resolution of ratification, March 25, 1840, and it is submitted that the statements contained in this document are most important, as showing precisely what tribes or bands the Senate had in mind when it used the expression "The Six Nations of New York Indians," and the further expression, "said tribes, the Seneca tribe included."

The document called No. 3, beginning on page 29 of Confidential Document B, is the report of R. H. Gillet, the commissioner of the United States who negotiated the treaty of Buffalo Creek with the New York Indians, and who was afterwards employed to obtain from the several tribes the assents required by the Senate's resolution of June 11, 1838. The material portions of this report are as follows:

WASHINGTON, *October 25, 1838.*

SIR: In pursuance of the instructions of your Bureau to me, under date of July 9, 1838, I have submitted to the several tribes of the New York

Indians the treaty concluded at Buffalo Creek on the 15th day of January last, together with the amendment proposed by the Senate of the United States in the resolution of ratification of the 11th of June last. I now hand you a copy of the amended treaty, with the assent of the several tribes in writing. At the time of making the submission I fully and fairly explained the treaty and amendments to each tribe assembled in public council, according to the letter and spirit of the resolution of the Senate. I have now the honor to report to you the result of my labors with each of the several tribes.

Oneidas in New York.

On the 9th of August last I met this tribe in full council. [Then follows a statement in regard to the declaration of assent of this tribe, which is annexed to the treaty, 7 Stats., 562.]

Oneidas at Green Bay.

This portion of the tribe signed the treaty at Buffalo Creek and were parties to it. The letter of the Senate resolution appeared to me to require that the treaty and amendments should be submitted to this tribe; but another treaty having been made with them and ratified by the Senate, I thought it proper to ask special instruction from your bureau as to the propriety of the submission. My letter of the 16th of August last contains my views on this subject, and the letter from your office of the 22d of that month contains the instructions by which I was governed. These letters are, of course, to be found in your office. In consequence of the instructions received, *I did not make the submission to this tribe.*

* * * * *

The Tuscaroras.

On the 14th of August last, I met the Tuscaroras assembled in full council. [Here follows a statement as to the assent of the Tuscaroras, which is annexed to the treaty, 7 Stats., 563.]

Onondagas residing on Seneca reservations.

On the 22d of September last I caused a notice from the subagent to be served on the Onondagas residing on the Seneca reservations, requiring them to meet in council to receive a communication from me. [Then follows a statement in regard to the assent of these Onondagas, annexed to the treaty, 7 Stats., 564.]

The Cayugas.

This tribe is reduced in number to 130 souls. * * * On the 22d of September last a notice was served on them. [Then follows a statement as to the assent of the Cayugas, which is annexed to the treaty, 7 Stats., 563.]

Onondagas at Onondaga.

This portion of the Onondaga tribe was not present at the council at Buffalo Creek last winter, and consequently were not parties to the treaty. Lands were, however, provided for them in it at the West should they subsequently assent to the treaty. I was informed that various misrepresentations had been made to them concerning the treaty, and that unless they were corrected it would result in their sending a delegation to Washington to make inquiries on the subject. I deemed it proper to convene them in council and make the necessary explanations, and

relieve them from their fears. This I did on the 17th instant. My explanations had the effect I contemplated. Several expressed their desire to explore the new country at the West, saying, if it answered my description of it, many young men would remove there. This tribe was not represented in the exploring party sent out in 1837. I think it proper they should be permitted to see the country for themselves, and incline to the opinion that it would lead to their eventual removal to that country.

American Party of the St. Regis.

On the 9th of October last, I convened this tribe in council on their reservation in the State of New York. [Then follows a statement in regard to the assent of the St. Regis, annexed to the treaty, 7 Stats., 564.]

The Senecas.

[All the remaining portion of this report is devoted to a statement of the circumstances attending the assent given by the Senecas, which is annexed to the treaty, 7 Stats., 561, and of the disputes in regard to the validity of this assent.]

R. H. GILLET.

To the Commissioner of Indian Affairs.

The above report clearly shows precisely what tribes assented to the amended treaty and became parties thereto within the letter and spirit of the Senate resolution of June 11, 1838. They were the Senecas, Cayugas, Onondagas residing with the Senacas, Oneidas in New York, Tuscaroras, and St. Regis. The words "American party

of the St. Regis" are not used to distinguish the assenting Indians from any others in New York, but from that branch of the tribe which lived a short distance across the border in Canada.

Document No. 5, beginning on page 65 of Confidential Document B, is the report, dated October 29, 1838, from the Commissioner of Indian Affairs to the Secretary of War in regard to the assents of the various tribes to the amended treaty, and transmitting Gillet's report. It contains the following statement in regard to the Oneidas at Green Bay:

> The amended treaty was not submitted to the Oneidas at Green Bay, although they signed the original one made at Buffalo Creek. The resolution of the Senate might be thought in spirit to embrace them; but the instructions to the Commissioner dispensed with any application to them, and, I think, rightfully. A treaty was concluded at Washington on the 3d of February, and ratified by the Senate on the 17th of May, 1838, with the First Christian and Orchard parties of Oneida Indians residing at Green Bay, superseding the nineteenth article of the original treaty of Buffalo Creek, which the Senate struck out for that reason, *leaving to these parties no interest or participation in the amended treaty.*

These two reports, Nos. 3 and 5, are the only portions of Confidential Document B which refer to the assents of any of the tribes other than the Senecas, the validity of whose assent was disputed, and with the question of which validity the document itself is chiefly concerned.

When the Senate was considering for the last time the treaty of Buffalo Creek, in consequence of the Presi-

dent's message of January 14, 1840, it had also before it a treaty made with the Stockbridges and Munsees on September 3, 1839, and referred to the Senate by the President December 12, 1839. (5 Sen. Ex. Jour., 223.) This treaty was made "between the United States and the Stockbridge and Munsee tribes of Indians (formerly of New York)," and provides for the sale of a portion of their land on the east side of Lake Winnebago, and the emigration of such members of the tribe as desired to emigrate, but this emigration was not to be to the land promised in the treaty of Buffalo Creek to be set apart for these tribes as well as the others of the New York Indians, but to such country as should afterwards be selected in the West by an exploring party, which was provided for in article 6. (7 Stats., 580.)

The affairs of the Brothertowns had already been dealt with by the Senate in the previous year when it passed the bill which became the act of March 3, 1839 (5 Stats., 349). This statute provided for dividing the lands of the Brothertown tribe in severalty and for admitting the members of that tribe to citizenship. With Confidential Document B, the Oneida treaty of 1838, the Stockbridge and Munsee treaty of 1839, and the act of March 3, 1839, before them, the Senate can not but have been aware that the Onondagas at Onondaga, the Stockbridges, Munsees, and Brothertowns had never been parties to the treaty of Buffalo Creek at all, either in its original form or as amended by the Senate, and that the Oneidas at Green Bay, though parties to the original treaty, were not parties to the treaty as amended; and further, the Senate must have been aware of the

precise reasons why each one of these tribes had failed to be a party to the treaty. When, therefore, the Senate resolved on March 25, 1840, "that in the opinion of the Senate, the treaty between the United States and the Six Nations of New York Indians, together with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to and approved by said tribes, the Seneca tribe included, and that in the opinion of the Senate the President is authorized to proclaim the treaty as in full force and operation," it is manifest that the words "the Six Nations of New York Indians" were used merely as a general description of the parties with whom the treaty had been made, and not as a positive assertion that the treaty had been made with every one of the tribes comprising the Six Nations, the treaty, as already stated, having been made with the individual tribes, and not with any confederation or aggregation of them. It follows, also, that the words "have been acceded to and approved by said tribes, the Seneca tribe included," did not mean that the treaty had been acceded to and approved of by every tribe belonging to the group known as the Six Nations, but simply that the assents of all of the assenting tribes, the Seneca tribe included, were satisfactory. In point of fact, the first finding in this case states that the Six Nations were the Senecas, Cayugas, Onondagas, Oneidas, Tuscaroras, and Mohawks, but that the Mohawks had removed to Canada. The St. Regis were not a portion of the Six Nations, although a party to this treaty both in its original and amended form. If, therefore, the term "Six

Nations" had been used with exactness, it would have excluded the St. Regis, a result which the Senate certainly did not intend.

It follows from the above review of the facts in regard to the execution of this treaty and the assent to it as amended, that the words in the jurisdictional act, "the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek New York, on the 15th of January, 1838," refer to the Senecas, Cayugas, Onondagas residing with the Senecas, Oneidas in New York, Tuscaroras and St. Regis, *and no others*, and that this court has no jurisdiction to order a judgment to be entered in favor of any other parties.

The error of the court below.

The document "Confidential B" was, as appellants' counsel have stated (Second Additional Brief on Reorganziation, p. 4, note), not brought to the attention of the court below, and consequently that court was not informed that the Senate, when it adopted the resolution of March 25, 1840, knew perfectly well that only the Senecas, Cayugas, Onondagas residing with the Senecas, Oneidas in New York, Tuscaroras, and St. Regis were parties to the treaty as amended. It is clearly due to this lack of information on the part of the court below that that court has decided that—

> The Indians described in the jurisdictional act, sending this case to this court as "The New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the 15th

> of January, 1838," were the following: Senecas, Onondagas, Onondagas residing on the Seneca Reservation, Onondagas at Onondaga, Cayugas, Cayugas residing on the Seneca Reservation, Cayuga Indians residing in the State of New York, Tuscaroras, Tuscaroras residing in the State of New York, Oneidas residing in New York, at Green Bay (Wisconsin), and in the Seneca Reservation, Oneidas, St. Regis, St. Regis in New York, The American party of the St. Regis residing in the State of New York, Stockbridges, Munsees, Brothertowns." (Rec., p. 7.)

The above must not be understood as committing the Court of Claims to the proposition that each of the above names refers to a separate tribe or band, it being obvious that many of them describe the same tribe or band, but the substance of the statement is that the court below has decided as a matter of law that the proper parties claimant in this case, under the jurisdictional act, are the Senecas, Cayugas, Onondagas residing with the Senecas, Onondagas at Onondaga, Oneidas in New York, Oneidas at Green Bay, Tuscaroras, St. Regis, Stockbridges, Munsees, and Brothertowns, they having all been, in the opinion of the court, parties to the treaty both in its original and amended form. This decision appears among the findings of fact, but it is really a conclusion of law, and the reason for it appears on page 31 of the record.

[*] When the same question was before the Court of Claims under the Bowman Act, it reported the fact to be that there was no evidence before the court that the Onondagas at Onondaga, Oneidas at Green Bay, Stockbridges, Munsees, and Brothertowns ever assented to the treaty as amended by the Senate June 11, 1838. (Sen. Mis. Doc. No. 16, Fifty-second Congress, first session, Finding IX.)

After a statement of the various assents to the amended treaty actually annexed thereto the court goes on to say:

> The date of the acceptance of the treaty as amended by the Senate June 11, 1838, by the following tribes: Onondagas at Onondaga, Oneidas at Green Bay; Stockbridges, Munsees, Brothertowns, does not appear, but the court is of opinion, and so holds, that they did accept, and this for the following reasons:
>
> The Senate, after the treaty had been sent to them, resolved that it be ratified, provided, among other things, that the ratification have no effect until the treaty with the Senate amendments be submitted and explained to each of the tribes or bands separately, and they have given their free and voluntary consent thereto; that as to those assenting the treaty take effect; as to the others, they should cease to be parties to it, and the President should thereupon make a proportionate reduction from the $400,000 fund and the quantity of land provided for west of the Mississippi. Later, when the treaty was again before the Senate, a resolution was passed which in substance provided that when the President should be "satisfied that the assent of the Seneca tribe of Indians has been given to the amended treaty" with the New York Indians according to the first resolution, then the President might proclaim the treaty and carry it into effect. It is apparent at this point that, except the Senecas, all the New York Indians, in the Senate's opinion, had assented to the amended treaty. This second resolution was adopted March 2, 1839. A year later (March 25, 1840) the Senate passed this resolution:
>
> "That in the opinion of the Senate the treaty between the United States and the Six Nations of

the New York Indians, together with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to and approved by said tribes, the Seneca tribe included, and that in the opinion of the Senate the President is authorized to proclaim the treaty as in full force and operation."

Thereupon followed the President's proclamation, wherein we find the following recitals:

"Whereas a treaty was made and concluded at Buffalo * * * by * * * a commissioner on the part of the United States and the chiefs, head men, and warriors of the several tribes of New York Indians assembled in council; and whereas the Senate did * * * advise and consent to the ratification of said treaty with certain amendments; * * * and whereas the Senate did [pass the resolution of March 25, 1840 (*supra*)]: Now, therefore, be it known that I, Martin Van Buren, President of the United States of America, do [pursuant to the two Senate resolutions (*supra*)] accept, ratify, and confirm said treaty, and every article and clause thereof, * * * [dated April 4, 1840]."

It therefore appears that the question of assent on the part of all the parties was maturely considered by the treaty-making power at the time, and that power in both its branches was convinced, and so decided, that all the New York Indians have assented to the treaty as amended. Behind that authoritative decision we are not disposed to look, even if we have the power to do so.

Undoubtedly it does appear that the question of assent *on the part of all the assenting parties* was "maturely considered by the treaty-making power at the time, and

that power in both its branches was convinced, and so decided," that all the assents that were given were valid and binding, but in view of the document, treaties, and statute which the Senate had before them the conclusion of the Court of Claims that the President and Senate decided that the other tribes, whose assents were not annexed to the treaty, were equally parties thereto, can not possibly be sustained.

The acreage to which the parties to the treaty were entitled.

According to the schedule contained in the treaty (giving the census of all the tribes of the New York Indians, both those in Wisconsin and those in New York), which schedule was stated in the second article to afford the basis upon which the size of the tract of land to be set apart was calculated, the population of the tribes who were parties to the treaty of Buffalo Creek as amended was as follows:

Senecas	2,309
Onondagas residing with Senecas	194
Cayugas	130
Tuscaroras	273
Oneidas in New York	620
St. Regis	350
Total	3,876

From this total should be deducted the 650 Tonawanda Senecas who received the value of their share under the treaty of November, 1857 (11 Stats., 735), and also the 32 Indians who actually received allotments of land. This leaves the total number of Indians entitled, as of the date of the treaty of Buffalo Creek, to receive land at 320

acres apiece, 3,194, and the acreage upon which a judgment in their favor should be based is 1,024,080 acres, and no more. In support of this conclusion it has been already shown above that the treaty did not contemplate an increase in the area of the tract to be assigned to any tribe in consequence of a failure on the part of any other tribe or tribes to become parties to the treaty and entitled to receive a share of the land. This is not merely manifest from the language of the treaty itself, but from the understanding of the parties, as shown in the Tonawanda treaty of November 5, 1857. The court below has found as a fact that the sum of $256,000 paid and invested for the Tonawandas under that treaty "was equivalent to $1 per acre for the lands in Kansas to which the Tonawandas would have been entitled had they all emigrated under the treaty of Buffalo Creek, and also to part of the sum of $400,000 proportioned to their numbers as compared with the whole number of New York Indians, according to the schedule in the treaty." (Rec., p. 21.) The Tonawandas, being 650 in number, were entitled to 208,000 acres of land, and hence the sum of $256,000 was made up as follows:

For share of land	$208,000
For share of fund of $400,000	48,000
Total	256,000

The correctness of this computation is admitted by the appellants in their petition. (Rec., p. 5.) Had it been the understanding of the parties that the Indians who were parties to the treaty were entitled to the whole tract of 1,824,000 acres, even though some of the tribes that were named in the treaty as possible beneficiaries never

became parties thereto, it is obvious that a different computation would have been made in the case of the Tonawandas, and that they would not have been restricted to 320 acres apiece.

The same understanding is shown in the act of November 19, 1873 (17 Stats., 466), which provided for giving to the Indians who actually emigrated and remained on the land 320 acres apiece, and no more.

It is further submitted that the acreage upon which a judgment should be based should be affected by another "just deduction" to the extent of 56,320 acres, being 320 acres for each of the 176 Indians who were removed to the land at the cost of the United States in 1846, but who either died or returned to New York before any allotments were made to them. In the absence of evidence that their death or abandonment of the country to which they had been removed were due to any act or neglect of the United States, it is obvious that their rights lapsed with their death, or ceased from their abandonment of the land.

Making this deduction, the acreage upon which judgment should be based is 965,760 acres, the amount of the judgment to be divided among the tribes who were parties to the treaty in proportion to their numbers as given in the treaty, allowing in each case for the deductions made as above submitted.

CHARLES C. BINNEY,
Special Attorney.

L. A. PRADT,
Assistant Attorney-General.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1897.

NEW YORK INDIANS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 106. Argued March 2, 3, 1898. — Decided April 11, 1898.

The provision in the treaty of June 15, 1838, with the New York Indians, that the United States will set apart as a permanent home for them the tract therein described in what afterwards became the State of Kansas, was intended to invest a present legal title thereto in the Indians, which title has not been forfeited and has not been reinvested in the United States; and the Indians are not estopped from claiming the benefit of such reservation.

It appears by the records of the proceedings of the Senate that several amendments were there made to said treaty, including a new article; that the ratification was made subject to a proviso, the text of which is stated in the opinion of the court; and that in the official publication of the treaty, and in the President's proclamation announcing it, all the amendments except said proviso were published as part of the treaty, and it was certified that "the treaty, as so amended, is word for word as follows," omitting the proviso. *Held*, that it is difficult to see how the proviso can be regarded as part of the treaty, or as limiting at all the terms of the grant.

THIS was a petition by the Indians who were parties to the treaty of Buffalo Creek, New York, on January 15, 1838, 7 Stat. 550, to enforce an alleged liability of the United States for

the value of certain lands in Kansas, set apart for these Indians, and subsequently sold by the United States, as well as for certain amounts of money agreed to be paid upon their removal.

These claims were referred, under the act of March 3, 1883, known as the "Bowman Act," to the Court of Claims. That court reported its findings to the Senate, January 16, 1892, and thereupon, on January 28, 1893, Congress passed an act to authorize the Court of Claims to hear and determine these claims and to enter up judgment as if it had original jurisdiction of the case without regard to the statute of limitations. There was a further provision, that from any judgment rendered by that court, either party might appeal to the Supreme Court of the United States.

The petition, which was filed on February 10, 1893, set forth as the substance of the treaty that the claimants ceded and relinquished to the United States all their right, title and interest in and to certain lands of the claimants at Green Bay, State of Wisconsin, and in consideration of such cession and relinquishment the United States, in and by the said treaty, agreed and guaranteed as follows :

First. To set aside, as a permanent home for all of the claimants, a certain tract of country west of the Mississippi River, described by metes and bounds, and to include eighteen hundred and twenty-four thousand (1,824,000) acres of land, the same to be divided among the different tribes, nations or bands of the claimants in severalty, according to the number of individuals in each tribe, as set forth in a certain schedule annexed to the said treaty, and designated as Schedule A, upon condition that such of the claimants as should not accept, and agree to remove to the country set apart for them within five years, or such other time as the President might from time to time appoint, should forfeit to the United States all interest in the lands so set apart.

Secondly. The United States agreed to protect and defend the claimants in the peaceable possession and enjoyment of their new homes and to secure their right to establish their own government, subject to the legislation of Congress respecting trade and intercourse with the Indians.

Thirdly. The United States agreed that the lands secured to the claimants by the treaty should never be included in any State or Territory of the Union.

Fourthly. The United States agreed to pay to the several tribes or nations of the claimants, hereinafter mentioned, on their removal west, the following sums respectively, namely: To the St. Regis tribe, five thousand dollars ($5000); to the Seneca nation, the income annually of one hundred thousand dollars ($100,000), (being part of the money due said nation for lands sold by them in New York, and which sum they authorized to be paid to the United States); to the Cayugas, twenty-five hundred dollars ($2500) in cash, and the annual income of twenty-five hundred dollars ($2500); to the Onondagas, two thousand dollars ($2000) in cash, and the annual income of twenty-five hundred dollars ($2500); to the Oneidas, six thousand dollars ($6000) in cash, and to the Tuscaroras, three thousand dollars ($3000).

Fifthly. The United States agreed to appropriate the sum of four hundred thousand dollars, ($400,000) to be applied from time to time by the President of the United States for the following purposes, namely: To aid the claimants in removing to their new homes and supporting themselves the first year after their removal; to encourage and assist them in being taught to cultivate their lands; to aid them in erecting mills and other necessary houses; to aid them in purchasing domestic animals and farming utensils and in acquiring a knowledge of the mechanic arts.

By a supplemental article the St. Regis Indians were allowed to remove to the said country if they so desired, but were exempted from obligation so to do.

The treaty of Buffalo Creek having been duly assented to by all the parties thereto, was afterwards on, to wit, the 4th day of April, A.D. 1840, duly proclaimed; and certain disputes thereunder having arisen, it was afterwards modified in some particulars not having reference to the matter of this claim, and as so modified was again proclaimed on, to wit, the 26th day of August, 1842.

The petition further alleged that at the time of the making

of the treaty of Buffalo Creek aforesaid, and for many years prior thereto, the claimants owned and occupied valuable tracts of land in the State of New York, and had improved and cultivated the same and resided thereon, and from the products thereof chiefly sustained themselves.

That the President of the United States never prescribed any time for the removal of the claimants, or any of them, to the lands, or any of them, set apart by the treaty of Buffalo Creek, and no provision of any kind was ever made for the actual removal of more than about two hundred and sixty individuals of the claimant tribes, as contemplated by the said treaty; and of this number only thirty-two ever received patents or certificates of allotment of any of the lands mentioned in the first article of the said treaty, and the land allotted to those thirty-two was at the rate of 320 acres each, or 10,240 acres in all.

That after the conclusion of the said treaty of Buffalo Creek the United States surveyed and made part of the public domain the lands at Green Bay, ceded by the claimants, and sold or otherwise disposed of and conveyed the same and received the consideration therefor.

That the lands west of the Mississippi River, secured to the claimants by the said treaty of Buffalo Creek, were set apart by the United States and designated upon the land maps thereof as the New York Indian reservation, and so remained until in, or about the year A.D. 1860, at which time the United States surveyed and made part of the public domain the lands aforesaid, and the same were sold or otherwise disposed of by the United States, which received the entire consideration therefor; and the said lands thereafter were, and now are, included within the territorial limits of the State of Kansas. The said lands at the time the same were so appropriated by the United States were of great value, to wit, of the value of one dollar and twenty-five cents ($1.25) per acre and upwards.

That the action of the United States in appropriating the said lands as aforesaid was in pursuance of the proclamations of the President, of date December 3 and 17, 1860, and grew

out of an order of the Secretary of the Interior of the 21st day of March, A.D. 1859; and between the said last-mentioned date and the proclamation of the said lands aforesaid the claimants employed counsel to protect and prosecute their claims in the premises, and asserted that the United States had seized upon the said lands contrary to the obligations of the said treaty, and would not permit the said claimants to occupy the same or make any disposition thereof, and the claimants have steadily since asserted said claim in the premises.

That of the sum of $400,000, agreed by the treaty of Buffalo Creek to be appropriated by the United States for the purposes aforesaid, only the sum of $20,477.50 was ever so appropriated, except as hereinafter stated, and of this sum only $9464.08 was actually expended.

The petition further alleged that the Tonawanda band had been paid $256,000 for their interest in the land; that settlement had also been had with the Senecas, and that a special act had been passed authorizing the Court of Claims to find the facts and enter up judgment, without interest, and that the statute of limitations should not be pleaded as a bar to any recovery.

The petition concluded with a demand for a judgment for the value of the lands and for the amounts that were to be paid in cash.

The Court of Claims found the facts stated in the margin,[1]

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[1] FINDINGS OF FACT.

1. In 1780 the Six Nations of "New York Indians" consisted of the following nations or tribes: Senecas, Cayugas, Onondagas, Oneidas, Tuscaroras and Mohawks. The Mohawks soon after withdrew to Canada, relinquishing to New York all claim to lands in that State.

The court decide that the Indians described in the jurisdictional act sending this case to this court as "the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the 15th of January, 1838," were the following: Senecas, Onondagas, Onondagas residing on the Seneca reservation, Onondagas at Onondaga, Cayugas, Cayugas residing on the Seneca reservation, Cayuga Indians residing in the State of New York, Tuscaroras, Tuscaroras residing in the State of New York, Oneidas residing in New York, at Green Bay (Wisconsin), and in the

together with others which are not deemed material to the consideration of the case, and also found as a conclusion of law from these facts that the petition should be dismissed, whereupon the claimants appealed to this court.

Seneca reservation, Oneidas, St. Regis, St. Regis in New York, the American party of the St. Regis residing in the State of New York, Stockbridges, Munsees, Brothertowns.

2. Some of the New York Indians between 1810 and 1816 petitioned the President of the United States for leave to purchase reservations of their Western brethren with the privilege of removing to and occupying the same without changing their existing relations and treaties with the government or their right to the annuities promised in those treaties. (February 12, 1816, the Secretary of War, by authority of the President, gave his permission.) In 1820 and 1821 defendants aided some ten Indians, representing plaintiffs, in exploring certain parts of Wisconsin with a view to making arrangements with the Indians residing there for a portion of their country to be inhabited by such of the Six Nations as might choose to emigrate thither. Among the petitioners for leave to purchase reservations were the Onondagas, Senecas, Cayugas and Oneida nations of New York Indians.

August 18, 1821, the Menominees and Winnebago nations, in consideration of $2000, chiefly in goods, ceded, released and quitclaimed all their right, title and claim in certain lands near Green Bay, Wisconsin, amounting to about 500,000 acres, to the Six Nations and the St. Regis, Stockbridge and Munsee tribes, reserving the right of fishing and the right to occupy "a necessary proportion of the lands for the purposes of hunting, provided that in such use and occupation no waste or depredation should be committed on lands under improvement."

The President's approval of the arrangement found in the treaty of August 18, 1821, was signified February 19, 1822, as follows:

"The within arrangement, entered into between the Six Nations, the St. Regis, Stockbridge and Munsee nations, of the one part, and the Menominees and Winnebagoes of the other, is approved, with the express understanding that the lands thereby conveyed to the Six Nations, the St. Regis, Stockbridge and Munsee nations are to be held by them in the same manner as they were previously held by the Menominees and Winnebagoes.

"JAMES MONROE.

"February 19, 1822."

The $2000 above mentioned was thus paid: In goods, $900 from the Stockbridges, $400 from the Oneidas, $200 from the Tuscaroras; in cash, $500. The Senecas subsequently denied that they had any title to any lands in Wisconsin. It does not appear that the Cayugas or Onondagas claimed any interest in the lands prior to 1860.

3. Permission to secure an extension of the cession in the preceding

Counsel for Appellants.

Mr. Joseph H. Choate for appellants. *Mr. Henry E. Davis, Mr. Guion Miller, Mr. George Barker, Mr. James B. Jenkins* and *Mr. Jonas H. McGowan* were with him on the brief.

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finding recited was given by the Secretary of War, and thereafter, on September 23, 1822, the Menominees, in consideration of $3000 in goods, made a similar cession of another tract containing at least 5,000,000 acres, rather undefined, (adjoining the above,) to the Stockbridge, Oneida, Tuscarora, St. Regis and Munsee nations, the releasees promising, however, that the releasors should "have the free permission and privilege of occupying and residing upon the lands" in common with the former.

The President's approval was given March 13, 1823, as follows:

"The foregoing instrument is approved, so far as it conveys to the Stockbridge, Oneida, Tuscarora, St. Regis and Munsee tribes or nations of Indians that portion of the country therein described which lies between Sturgeon Bay, Green Bay, Fox River; that part of the former purchase made by said tribes or nations of Indians of the Menominee and Winnebago Indians on the 8th of August, 1821, which lies south of Fox River and a line drawn from the southwestern extremity of said purchase to the head of Sturgeon Bay, and no farther, that quantity being deemed sufficient for the use of the first before-mentioned tribes and nations of Indians. It is to be understood, however, that the lands, to the cession of which to the tribes or nations aforesaid the government has assented, are to be held by them in the same manner as they were held by the Menominees previous to concluding and signing the aforegoing instrument, and that the title which they have acquired is not to interfere in any manner whatever with the lands previously acquired or occupied by the government of the United States or its citizens."

October 27, 1823, the Secretary of War officially notified the releasees that the President distinctly wished them to understand that by this partial sanction he did not mean to interfere with, nor in any manner invalidate, their title to all the lands which they had thereby acquired, including those not confirmed by the government, but, on the contrary, he considered their title to every part of the country conveyed to them by the releasors as equally valid as against them; and that what they had done was with the full assent of the government.

Of the consideration above mentioned, $1000 were paid by the Stockbridges and Munsees, while $1000 were to be paid by the Oneidas, Tuscaroras and St. Regis in one year from September 23, 1822, and $1000 in two years from that date. Of the two latter amounts $1000 appears to have been paid by the United States out of the funds of the St. Regis about 1825, while $950 were paid by the Brothertown tribe September 18, 1824. In consideration of which the releasees, by an agreement with the Brothertowns, under date of January 8, 1825, ceded to them a small separate tract by metes and bounds, and, after reserving to themselves, for each tribe of the releasees,